

# FRB's "Buying Or Selling A Business" Series

## Offers, Contracts and Closing

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### Front Range Business, Inc.

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*Offices In Boulder, Breckenridge,  
Evergreen, and Fort Collins*

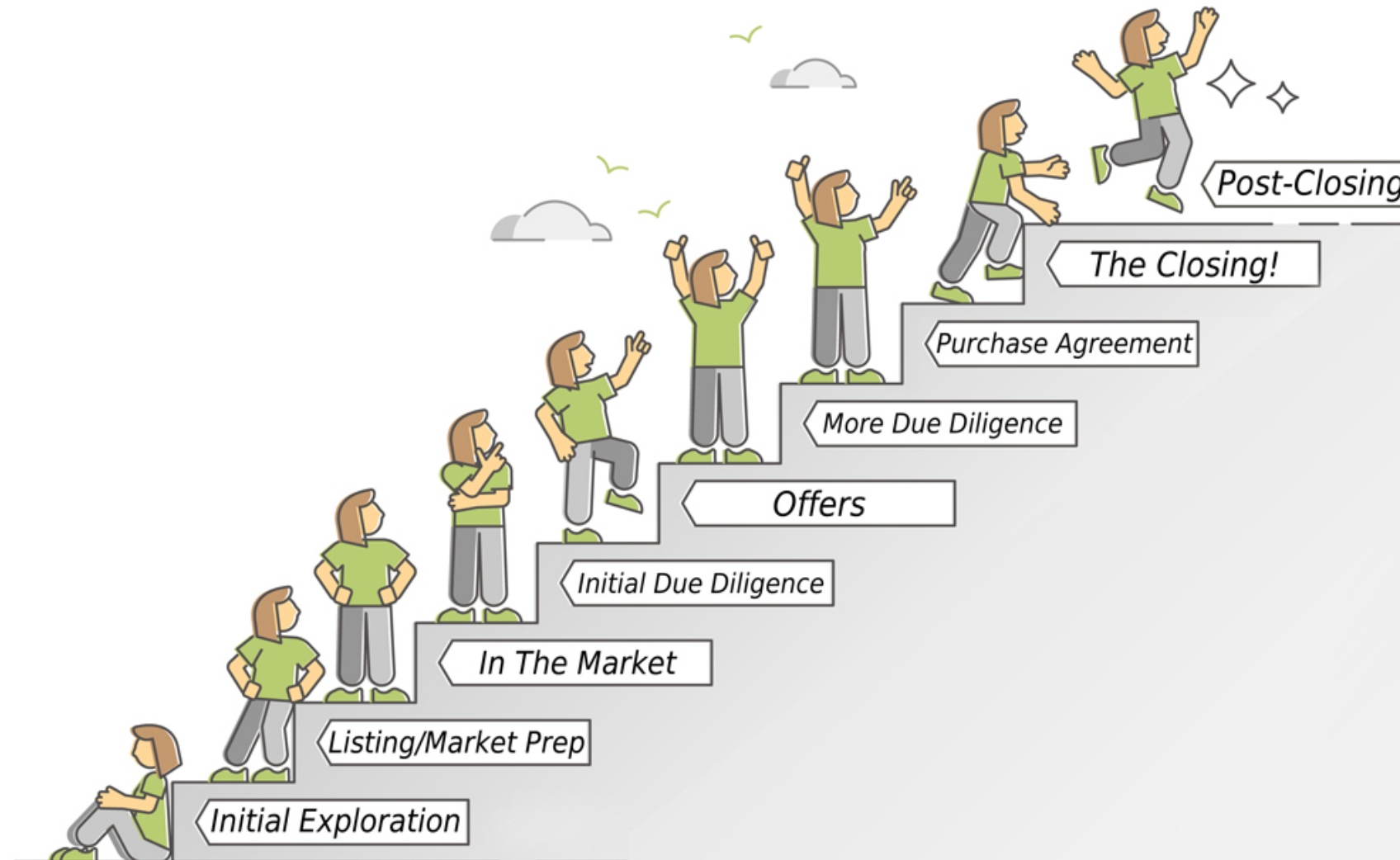


*Don Hobbs  
Thursday, August 25, 2022*

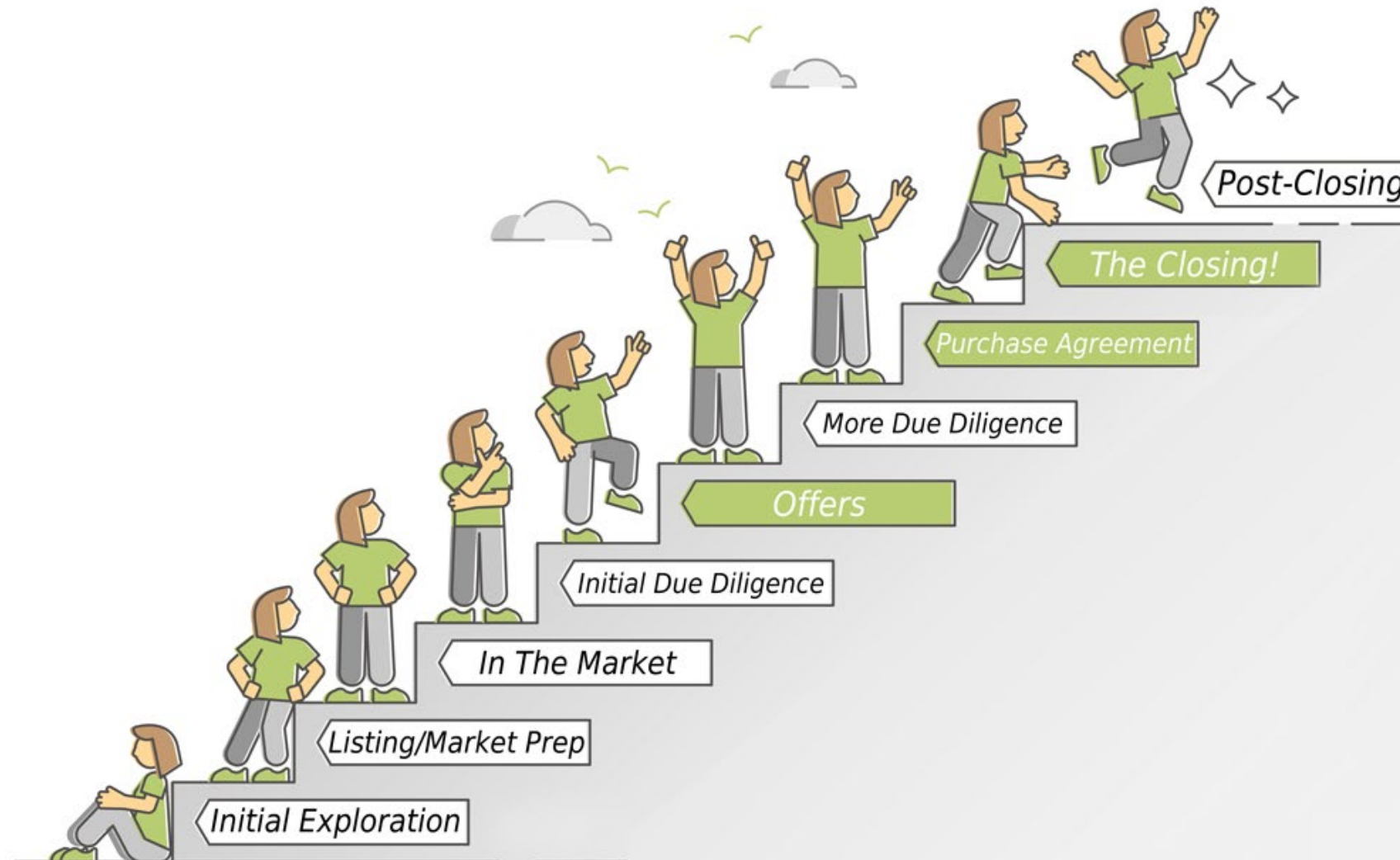
# Program Overview

- *Not a “How To”, more of a detailed introduction.*
- *Every transaction is a bit different, can’t cover every variable, focus on most common elements.*
- *Welcome your questions using the chat feature.*
- *Encourage you to contact us after the program if you have any questions.*

# All Business Sales Have 9 Steps



# There Are 3 Contract / Legal Steps



# 1

# Offers

## Before You Make the Offer.....

- *Know your resources and capabilities to acquire....and be prepared to prove it. The seller will require this to take your offer seriously.*
- *Is it a good fit? Understand the geography, personal real estate costs, financial needs, family circumstances, industry cycles, etc.*
- *You know enough to clearly and thoughtfully answer the question “I want to purchase this business because.....”*

## Good Buyers Know....

- *DO NOT submit an LOI if you aren't serious.*
- *You aren't doing the seller a favor, earn the winning bid.*
- *Seller is parting with years of building a lifestyle, employee family, civic connections, etc. Get beyond the numbers to build rapport.*
- *Offers less than asking price should indicate why.*
- *Sellers need time to review & compare offers, allow the market to inform them.*
- *Deals move at the speed of trust.*

# The Basics of Offers

- *Expectation setting on both sides.*
- *Can begin w/ informal float of price & key terms to offer guidance.*
- *A formal Letter of Intent (LOI) is signed and submitted by buyer, often w/ broker assistance.*
- *An LOI is a non-binding agreement.*
- *Avoid loose ends or unaddressed items that can lead to later disagreements.*
- *Attorneys not usually involved or necessary.*



# Price / Deal Type

- *The total dollar amount to be paid for the business.*
- *Asset acquisition*
- *Stock purchase (take over the S or C Corp)*
- *Membership Interest purchase (take over the LLC)*

# Baseline Business Terms

- *Included inventory.*
- *Included working capital.*
- *Work in Progress (WIP).*
- *Escrows (aka Holdbacks): Business performance, customer retention, taxes paid, etc.*
- *Earnouts and Earndowns.*

# Earnest Money

- *Common range of ½ of 1% of price to 3% of price.*
- *Held in escrow.*
- *Buyer's proof of genuine interest.*
- *Buyer's proof of ability to access capital.*
- *Typically fully refundable for any reason if deal is cancelled.*

## The Offer So Far.....

- *\$1,000,000 Price*
- *Asset Sale*
- *Includes \$100,000 in Inventory*
- *Does not include Working Capital*
- *Does not include Work In Progress (WIP)*
- *Escrows: \$75,000 for Customer Retention in 1<sup>st</sup> Year, \$25,000 until proof that all taxes paid*
- *No earnout or earndown*
- *\$10,000 Earnest Money, fully refundable*

# How Is Purchase Paid For?

- *Buyer equity injection (cash / down payment)*
  - *Most common is 10-30%*
- *SBA / Commercial lender*
  - *Most common is 70-80%*
- *Seller / Promissory note*
  - *Most common is 0-20%*

# Transaction Timeline – Key Dates

- *LOI Mutual Signing*
  - *Buyer needs time to weigh the offers*
  - *Always need to negotiate/refine an LOI*
- *Purchase Agreement Mutual Signing*
  - *30-45 days from LOI signing*
- *Due Diligence Completion (optional)*
  - *Similar to Purchase Agreement*
- *Closing*

# Transition and Training

- *Training vs. Consulting vs. Management*
- *Duration: Days? Weeks? Months? Year?*
- *Total Hours/Days?*
- *On-premise vs. remote.*
- *Seasonal businesses have unique schedules.*
- *Buyers invariably ask for too much to mitigate risk.*
- *Initial request can be modified by due diligence learnings.*

# Exclusivity

- *Provides the buyer with an unobstructed path to make the deal happen.*
- *Taking a business completely off the market isn't usually reasonable.*
- *Typically has an expiration deadline.*



# Due Diligence

- *Buyer looking “under the hood.”*
- *Not a burdensome open-ended review of whatever the buyer wants to see.*
- *Identify what could lead to termination of transaction.....or better yet to moving forward.*
- *Material evaluation vs. operating information.*
- *Reasonable timeline to deliver.*
- *Seller determining buyer capability to get deal done and provide information.*

# Contingencies – Not Optional

- *Acquire lender financing.*
- *Receive landlord approval and suitable lease.*
- *Licensing (liquor, trade license, etc.).*
- *Receive Supplier or Franchisor approval.*

# Contingencies – Optional

- *Key employee retention.*
- *Non-compete (time period, location, activity).*
- *Buyer's satisfaction with validation of books and records.*
- *No material change in business.*

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## The Next Deal Points.....

- *\$200,000 Buyer Equity, \$725,000 SBA Loan, \$75,000 Seller Note (5 years, 7%).*
- *LOI 10 Days, Purchase Agreement 45 days following LOI, Closing 60 days following Purchase Agreement.*
- *40 hours of onsite training in first 20 days after Closing, 20 hours of remote training next 30 days, 20 hours remote next 6 months.*
- *Seller won't sign other LOI prior to Purchase Agreement target date, will talk to buyers.*

# The Final Deal Points.....

- *Due Diligence Period: Landlord meeting.*
  - *Lender selection & commitment*
  - *No license, supplier or franchise approval required*
- *Contingencies:*
  - *Getting \$725,000 SBA financing commitment*
  - *Assignment or suitable new lease with landlord*
  - *Buyer satisfaction with books and records*
  - *No material change in business*
- *Non compete of 3 years, 25 miles from current location, same business.*

## Good Sellers Know.....

- *All offers/buyers will have strengths and weaknesses, understand what is most important to you: timeliness, price, clean exit, employee retention, seller note, personal connection, etc.*
- *It's always a negotiation, some compromise and flexibility is always needed.*
- *Sellers should only enter into one LOI.*
- *Deals move at the speed of trust.*

# 2

# Contracts



# Contracts / Purchase Agreements

- *LOI is the non-binding intention to purchase, Purchase Agreement is the binding contract to purchase.*
- *Asset Purchase Agreement is most common.*
- *APA is the acronym we will use today.*

# APA (Asset Purchase Agreement)

- *Legally binding agreement (Musk & Twitter).*
- *Attorneys are involved and important – experience counts!*
- *APA is the “playbook” for the transaction.*
- *10-30 pages + exhibits.*

# Common Buyer Pre-APA Tasks

- *Confirm lender and loan commitment.*
- *Confirm assignment or new lease w/ landlord.*
- *Establish business entity.*
- *Resolve any other contingencies.*

## Good Buyers Know.....

- *Only change LOI price & terms due to material issues.*
- *Expectation of “certainty” to complete the transaction.*
- *(Majority) completion of due diligence and buyer advance preparatory tasks is expected.*
- *Deals move at the speed of trust.*

# Common Revisions from LOI

- *Earnest Money: Adjust or make non-refundable.*
- *Contingencies: Often reduced (always retain lending, lease, material change).*
- *Financing: Proof of lender commitment, loan in underwriting, lender requirements.*
- *Closing Timeline: Adjust for practical realities.*
- *Exclusivity: Often take business off the market.*
- *Transition Support: Often tweaked/modified.*
- *Exhibits added.*

# Financial Adjustments / Settlements

- *Division of customer deposits.*
- *Retention of cash on hand.*
- *Receipt of accounts receivable.*
- *Responsibility for accounts payable.*
- *Transfer of seller deposits (lease, utilities, etc.).*
- *Prorations (rent, advertising, web hosting, etc.).*

# Assets to Transfer

- *Tangible: Vehicles, equipment, fixtures, leasehold improvements, supplies.*
- *Intangible: Trade names, websites and domain names, social media, customer lists, email lists, phone numbers, financial records.*
- *Exclusions.*

# Allocation of Price

- *Total price is broken into defined IRS categories with tax and accounting implications for buyer and seller.*
  - *Inventory: Methodology to value, target amount, when calculate, settlement process.*
  - *Tangible Assets: Land, buildings, personal property (FFE).*
  - *Intangible Assets: Intellectual property, non-compete, training, franchise rights.*
  - *Business tradename, goodwill.*

- *File IRS 8594.*



# Allocation of Price

- *\$1,000,000 Total price*
- *\$100,000 Inventory*
- *\$100,000 FFE / Personal Property*
- *\$5,000 Non-compete*
- *\$5,000 Training*
- *\$790,000 Goodwill*

# Work In Progress

- *Common with project-based or manufacturing businesses.*
- *Adjusting for completed (or partially completed) work, variable amounts of customer payment.*
- *Can factor in labor, materials, sales cost, admin, operations.*

# Tax Obligations

- *Tax liability typically transfers with the business ownership.*
- *Seller owns responsibility for tax liabilities incurred up through closing.*
- *Payment often in arrears, needs a settlement value.*

# Debts and Loans

- *Typically all debts to be retired / paid off.*
- *Buyer assumes no liabilities for debts.*
- *PPP declining as an issue w/ forgiveness.*

# Employees

- *Hardest first – Do any employees need to be terminated by seller?*
- *Key employee retention plan.*
- *Employee notification plan.*
- *Payroll transition plan.*
- *Employee raises prior to closing.*
- *Accrued employee benefits and bonus plans being taken on by buyer.*
- *Employee policies for vacation, illness, etc.*

# Possession

- *Specifies when the business actually transfers to buyer.*
- *Typically 12:01am on day of closing (1<sup>st</sup> business day belongs to buyer).*
- *Typically keys at closing.*

# Representations and Warranties

- *Good standing*
- *Authority to act*
- *Ownership*
- *Involved brokers and fees*
- *Leases*
- *Disclosure of material facts*
- *Legal claims*
- *Product liabilities*

# Boilerplate (1)

- *Termination*
- *Indemnification*
- *Conduct of business to closing*
- *Confidentiality*
- *Timeliness*
- *Cooperation*
- *No governmental actions / restraints*



## Boilerplate (2)

- *Entire agreement*
- *Definitions*
- *Notices*
- *Governing law*
- *Fees and expenses*
- *Waiver in writing*
- *Method of signing*

# 3

# Closing

# Overview

- *The legal transfer of the business from seller to buyer.*
- *Highly detailed process, precision required.*
- *Attorney with escrow capability to receive and disburse funds. Experience matters!*
- *Buyer and Seller agree on person, typically split costs.*
- *More \_\_\_\_\_*

# Pre-Closing Activities

- *Perform UCC lien search*
- *Obtain any payoff statements*
- *Check status/amounts of personal property taxes*
- *Validate seller and buyer entities*
- *Coordinate with SBA lender (Seller note and SBA loan)*
- *Receive all inbound funds*
- *Prepare closing documents for advance review by parties*

# Key Closing Documents (1)

- *Closing instructions*
- *Settlement statements*
- *Entity resolutions*
- *Bill of Sale for tangible assets, vehicle odometer statements*
- *Assignments (intangible assets, equipment leases, premise lease)*

## Key Closing Documents (2)

- *Non-competition agreement*
- *Seller promissory note & security agreement*
- *UCC financing statement*
- *Deed of Trust*
- *Personal property tax agreement*
- *Escrow agreement*

# Closing Facility / Services

- *May also be concurrent loan or property closings*
- *Provide notary services*
- *Provide copier/scanner*
- *Secretarial services as needed*

# Closing – Funds Disbursement

- *Seller proceeds*
- *Loan payoffs*
- *Escrow*
- *Broker commissions*
- *Broker referral fees*
- *Legal fees*



## Post Closing – Filings

- *Articles of Amendment for entity name change for seller.*
- *Withdrawal of trade name(s) for seller*
- *Statements of trade name(s) for buyer*
- *Loan payoffs for seller*
- *UCC Liens*
- *Transfer of trademarks*

# Post Closing – Celebrate!



# 4

## Key Takeaways

## Keep These In Mind....LOI

- *The LOI isn't a toe in the water trial balloon, it's a commitment to purchase with contingencies only for material issues.*
- *Seller enters into just one LOI.*
- *Non-binding so get to binding APA as quickly as possible.*

## Keep These In Mind....APA

- *The APA is legally binding.*
- *Indicates certainty for all parties that deal is moving forward.*
- *The playbook by which the transaction and closing will happen....or not.*
- *Both parties should use capable attorneys.*
- *Watch out for the error of omission.*

## Keep These In Mind....Closing

- *Use an experienced attorney with an agreed upon scope of work.*
- *Get mutual agreement of buyer and seller on the attorney.*
- *Circulate documents 5 days in advance for review.*
- *Disbursement of funds may be delayed if not received in advance and cleared.*

# Offers, Contracts and Closings

## Questions?

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*What's  
My Offer?*

*Is My  
Contract  
Solid?*

*Am I  
Ready To  
Close?*